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8  
9 UNITED STATES DISTRICT COURT  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
11

12 TERVON, LLC, a California limited ) CASE NO. 3:14-CV-00367-BAS-JMA  
13 liability company, SUNYATA K. LITTLE )  
14 and ELEANOR E. LITTLE, individuals; ) **PLAINTIFFS' OPPOSITION TO**  
15 and MARIO GUTIERREZ, an individual; ) **DEFENDANTS' RULE 12(b)(6) and 9(B)**  
16 ) **MOTION TO DISMISS AMENDED**  
17 Plaintiffs, ) **COMPLAINT; MEMORANDUM OF POINTS**  
18 v. ) **AND AUTHORITIES IN SUPPORT**  
19 ) **THEREOF;**  
20 JANI-KING OF CALIFORNIA, INC., a )  
21 Texas corporation, JANI-KING ) Hearing Date: To be re-assigned  
22 INTERNATIONAL, INC., a Texas ) (originally set for June 2, 2014)  
23 corporation; and DOES 1-100, Inclusive, ) Time: To be re-assigned  
24 ) Judge: Hon. Cynthia A. Bashant  
25 Defendants. ) Magistrate: Hon. Jan M. Adler  
26 )  
27 )  
28 )

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1 Plaintiffs TERVON, LLC, (“Tervon”), SUNYATA K. LITTLE and ELEANOR E.  
 2 LITTLE (“Little”) and MARIO GUTIERREZ (“Gutierrez”) (collectively “Plaintiffs”) hereby  
 3 submit the following Opposition to Defendant Jani-King International, Inc. (“Jani-King  
 4 International”) and Jani-King of California (“Jani-King California”) (collectively “Defendants”)  
 5 Motion to Dismiss Plaintiff’s Amended Complaint pursuant to Federal Rules of Civil Procedure  
 6 12(b)(6) and 9(B) as follows:

## 7 I. INTRODUCTION

8 Plaintiffs’ Amended Complaint, filed on March 18, 2014, asserts nine (9) causes of action  
 9 against Defendants. The nine causes of action relate to Defendants’ alleged unlawful business  
 10 practices, fraudulent and/or negligent misrepresentations, breach of (several different) contracts,  
 11 intentional infliction of emotional distress and declaratory relief. In summary, Plaintiffs allege  
 12 that Defendants fail to comply with their own Franchise Agreement and Equipment Lease  
 13 contracts, that they engage in a series of systematic unlawful business practices and that they  
 14 intentionally misled Plaintiffs and lied to them in order to induce Plaintiffs into accepting the  
 15 Qualcomm cleaning account.

## 16 II. ARUGUMENT AND AUTHORITIES

17 Under the Federal Rules of Civil Procedure, Rule 8(a) provides, in relevant part:

18 *(a) Claim for Relief. A pleading that states a claim for relief must contain:*

19 ...

20 *(2) a short and plain statement of the claim showing that the pleader is entitled to*  
 21 *relief[.]*

22 While the language of Rule 8(a) has not changed since 1938 and Rule 8(a) has historically  
 23 been interpreted to require “notice pleading” only, several cases have since required a higher  
 24 pleading standard. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L.  
 25 Ed. 2d 577 (2005) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed.  
 26 2d 929 (2007). However, the principles common to all of these cases are that (1) to be entitled to  
 27 the presumption of truth, allegations in a complaint or counterclaim may not simply recite the  
 28 elements of a cause of action, but must contain sufficient allegations of underlying facts to give

1 fair notice and to enable the opposing party to defend itself effectively and (2) the factual  
 2 allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not  
 3 unfair to require the opposing party to be subjected to the expense of discovery and continued  
 4 litigation. *Starr v. Baca*, 652 F.3d 1202, 1216, 2011 U.S. App. LEXIS 15283 (9th Cir. Cal. 2011)

5 For the most part, Defendants' 12(b)(6) and Rule (9) motion appears to attack the  
 6 Amended Complaint based on the premise that Plaintiffs have not provided the "who" "what"  
 7 "when" "where" and "how" information related to their claims.

8 However, Defendants are completing ignoring the more than nine (9) pages of factual  
 9 allegations contained in the Amended Complaint which are incorporated into each cause of  
 10 action. Plaintiffs therefore did not simply recite formulaic elements of each cause of action; each  
 11 cause of action is centered around a very lengthy and specific set of factual allegations which  
 12 more than suffice that both give fair notice to Defendants enabling them to defend themselves and  
 13 establishing Plaintiffs' entitlement to relief. Therefore, Defendants' Motion to Dismiss is  
 14 nothing more than the proverbial "file the motion just to file the motion" action and is a waste of  
 15 this Court's time.

16 **A. The Fourth and Fifth Causes of Action for Breach of Contract are**  
 17 **Sufficiently Plead and state Valid Causes of Action.**

18 (1) Breach of Franchise Agreements.

19 Defendant Jani-King of California confusingly alleges that the Breach of Contract claim  
 20 somehow does not explain which specific wrongdoing breached which exact contractual term,  
 21 and how. Defendant is incorrect on many levels.

22 The Fourth Cause of Action very clearly (i) states the specific contractual provisions of  
 23 the Franchise Agreement which are alleged to have been breached (Paragraph 96) and (ii) states  
 24 the alleged breaches of those provisions (Paragraph 98). Defendants also ignore the additional  
 25 factual allegations contained in Paragraphs 16-63. It is unclear how Defendants expect Plaintiffs  
 26 to explain "how" Defendants failed to do something. For example, Plaintiffs claim that the  
 27 Franchise Agreement at Section 6.6 requires Defendant "to provide additional training and  
 28 support for Franchisee." (Paragraph 96). Plaintiff then alleges that Defendant breached this

1 provision by “failing to provide Plaintiffs with training which was mandated by Jani-King’s  
2 contract with the City.” (Paragraph 98). But Defendants’ motion somehow argues that Plaintiffs  
3 are supposed to allege how Defendants failed to train Plaintiffs. If they failed to provide any  
4 training, how can one explain how? This doesn’t make sense.

5 Defendants also claim that somehow Plaintiffs contradicted themselves in the Amended  
6 Complaint which would (presumably) result in a reason to dismiss this entire cause of action.  
7 However, it appears that the Defendants have not even read the Amended Complaint correctly.  
8 First, Defendants claim that Plaintiffs alleged that a representative from Jani-King International  
9 became involved to assist Plaintiffs with the Qualcomm Account. There is no such allegation.  
10 Paragraphs 37, 76 and 87 (referenced in Defendants’ own motion) actually state that a  
11 representative from Jani-King International was sent to oversee the Qualcomm matter and  
12 continued to misrepresent the viability of the account. This was not “assisting Plaintiffs” in any  
13 way.

14 Second, Defendants also ignore Paragraph 41 wherein Plaintiffs claim that the purported  
15 “assistance” provided by other individuals actually resulted in further damages to Plaintiffs.

16 Defendants are grasping for straws in order to challenge these causes of action as they  
17 know they have no basis to do so. The required elements of a breach of contract cause of action  
18 were validly plead, as were the required factual allegations.

19 (2) Breach of Lease

20 Again, Defendant Jani-King of California’s arguments in this section make no sense. In  
21 the Amended Complaint, Plaintiff Gutierrez clearly points to the provision in the Lease  
22 Agreement(s) which states that Defendant is required to provide “termination liability on an early  
23 termination basis.” (Paragraph 106, Exhibit 4). Plaintiff Gutierrez then clearly alleges that  
24 Defendant failed to provide Plaintiff with any information regarding Plaintiff’s early termination  
25 liability, nor provided him with any accounting or appraisal of the equipment after Jani-King  
26 accepted the equipment back from Plaintiff.

27 But Defendants again state that Plaintiff is somehow required to explain “how” Defendant  
28 failed to do something. Again, this does not make sense.

Defendant also incorrectly claims that Plaintiff Gutierrez presents no specific allegations regarding how he has suffered damages. Again, the Amended Complaint clearly states, at Paragraphs 53, 105, 106 and 108 that Defendant is continuing to improperly charge Plaintiff Gutierrez fees for the equipment of which he is no longer in possession.

As such, the Fifth Cause of Action was validly plead and should not be dismissed.

**B. Because the Breach of Contract Claims are Validly Plead, the Breach of Good Faith and Fair Dealing Cause of Action Should not be Dismissed.**

Defendants' only challenge to the Sixth Cause of Action is based on their claim that Plaintiffs failed to state a cognizable claim for breach of contract. As stated above and herein, Plaintiffs have stated viable claims for both of Breach of Contract claims and therefore, the Breach of Covenant for Good Faith and Fair dealing cause of action should not be dismissed.

**C. Plaintiffs' First and Second Causes of Action for Fraud are Validly and Sufficiently Plead.**

Defendants claim that Plaintiffs failed the heightened pleading requirement for fraud under Federal Rule of Civil Procedure 9(B) by allegedly omitting the "who" "what" "when" "where" and "how" allegations. However, again, it appears that Defendants failed to even read the Amended Complaint in its entirety.

Rule 9(B) demands that the alleged fraud "be 'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9<sup>th</sup> Cir. Cal 2001) (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9<sup>th</sup> Cir. 1993)). Further, a plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Decker v. Glenfed, Inc. (In re Glenfed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9<sup>th</sup> Cir. 1994).

The Amended Complaint more than complies with these requirements.

Paragraphs 21 and 22 set forth facts and allegations which establish that Defendants knew its bid submitted to the City was underbid (and only included charges for a two day post clean). Paragraphs 28-30 establish that, despite Defendants' knowledge of the underbid, it represented



1 certain financial information to Plaintiffs as to the Qualcomm accounts' "profitability" knowing  
2 this information was false (and knowing that the information being presented to Plaintiffs was for  
3 three days of post clean). Paragraph 31 sets forth that Plaintiffs relied on the information  
4 presented to them by Defendants for them to agree to take the Qualcomm account. Paragraphs 36  
5 to 46 describe the significant losses sustained by the Plaintiffs as a result of Defendants' action.  
6 Furthermore, Paragraphs 64-83, representing the First and Second Causes of Action, provide the  
7 same detailed accounts of the "who" "what" when "where" and "how" the Plaintiffs are entitled  
8 to the relief requested. Thus, the allegation that these causes of action are not plead with  
9 specificity is nonsense.

10 Defendants also try to claim that not all Plaintiffs attended the June 22, 2013 meeting,  
11 which would then presumably negate the "reliance" prong of fraud. However, Defendants'  
12 apparently misread the Amended Complaint. The Amended Complaint is clear that Plaintiff  
13 Little was in fact, at the June 22 meeting and that Salvador Guterrez was present and authorized  
14 by Plaintiff Gutierrez to be present at this meeting (Paragraph 27). As a result, this argument has  
15 no merit.

16 Defendants next try to claim that Jani-King International's mere presence at the  
17 September 4, 2012 meeting forms the only basis of the fraud claim against Jani-King  
18 International and is therefore not sufficient. This is also incorrect. The Amended Complaint is  
19 clear that Plaintiffs were informed that Sean Ayres, from "corporate" was brought in to keep  
20 apprised of the Qualcomm matter (Paragraph 38). Subsequently, Plaintiffs were informed that  
21 after consulting with "corporate," that a new "task based" approach to the Qualcomm account  
22 would be taken. (Paragraph 40). At this time, Defendants still represented to Plaintiffs that the  
23 Qualcomm account was profitable, which Plaintiffs allege just continued to perpetuate the fraud  
24 (Paragraphs 40, 67, 68 and 69). Therefore, it was the continued actions by all Defendants that  
25 form the basis of the fraud causes of action, not the mere presence at the September 4, 2012  
26 meeting as Defendants allege.

27 Thus, because Plaintiffs' fraud causes of action were plead with the sufficient  
28 particularity, they are not subject to dismissal under Rule 9(b).

1 (1) Defendants' reliance on the economic loss rule is misplaced.

2 While Defendants' arguments on this issue are not entirely clear, it appears that they are  
3 arguing that Plaintiffs' fraud and breach of contract claims arise from the same set of facts and  
4 therefore the fraud claims should be dismissed. Defendants' analysis is incorrect on at least two  
5 levels.

6 First, Plaintiffs' Breach of Contract (Franchise Agreement) cause of action includes many  
7 claims that are independent of the fraud claims asserted. For instance, Plaintiffs claim (in  
8 Paragraph 98) that they were not afforded proper training, that Defendants failed to provide  
9 proper accounting for the fees charged to Plaintiffs and that Defendant failed to provide  
10 information and improperly charged Plaintiffs related to equipment leasing. None of these facts  
11 or allegations are contained or form the basis for the fraud causes of action. As a result, the  
12 damages incurred by Plaintiffs for these alleged breaches of the Franchise Agreements would be  
13 wholly separate from the damages claimed in the fraud causes of action.

14 Second, even if some of the facts alleged in the fraud causes of action also correspond to  
15 the breach of contract action, the fraud allegations are separate, independent allegations. Under  
16 California law, to maintain a fraud claim based on the same factual allegations as a breach of  
17 contract claim, a plaintiff must show that "the duty that gives rise to tort liability is either  
18 completely independent of the contract or arises from conduct which is both intentional and  
19 intended to harm." *Foster Poultry Farms v. Alkar-Rapidpak-MP Equipment, Inc.*, 868 F. Supp. 2d  
20 983, 992 (E.D. Cal. 2012), (citing *Robinson Helicopter*, 34 Cal.4th 979 at 989-90, 102 P.3d at  
21 268, 273 (2004) and *Erlich v. Menezes*, 21 Cal. 4th 543, 552, 87 Cal. Rptr. 2d 886, 981 P.2d 978  
22 (1999)). Here, Plaintiffs have alleged both: Defendants' actions related to inducing Plaintiffs to  
23 enter into the Qualcomm account were both intentional and intended to harm Plaintiffs.

24 While Defendants' rely on *Foster Poultry* is their motion, Defendants completely ignore  
25 the part of the opinion that is crucially applicable to the issues presented here. In *Foster Poultry*,  
26 the Court acknowledged that courts have declined to apply the economic loss rule in cases where  
27 a false statement causes a party to enter a contract (i.e. the fraudulent inducement exception). *Id.*  
28 at 992. In *Foster Poultry*, the Court declined to entertain this exception because the contract

1 Foster Farms claimed it was “induced” into entering was the same contract(s) alleged to have  
 2 been breached in its breach of contract causes of action. *Id.* at 994. Therefore, the fraud and  
 3 breach of contracts claims and damages merged. **However, this is not the case here.**

4 In the present matter, Plaintiffs have alleged, in Paragraphs 28-30, that Defendants  
 5 presented certain information to Plaintiffs regarding the Qualcomm account that the Defendants  
 6 knew was false (Paragraph 66) in an attempt to induce Plaintiffs into entering into the Qualcomm  
 7 account contracts. In reliance on the false information, Plaintiffs did, in fact, enter into the  
 8 Qualcomm account contracts (Paragraph 31).

9 Therefore, the fraudulent and false statements and actions alleged in the Amended  
 10 Complaint were alleged to have been made to induce Plaintiffs to enter into separate, independent  
 11 contracts (from the contract referenced in the breach of contract causes of action), i.e. the  
 12 Qualcomm contracts.

13 Defendants’ own flawed analysis and question (page 12, lines 15-21) regarding how  
 14 Defendants’ alleged actions could have induced Plaintiffs into the *Franchise Agreements* really  
 15 answers its own question. They did not. Defendants’ fraudulent actions induced Plaintiffs to  
 16 enter into the Qualcomm contracts, thus resulting in the set of independent and separate  
 17 allegations of facts and damages incurred. Thus, under the fraudulent inducement exception  
 18 alone, Plaintiffs’ claims for fraud are not barred by the economic loss rule and thus not subject to  
 19 dismissal.

20 **D. Plaintiffs’ Third Cause of Action for Negligent Misrepresentation is**  
 21 **Sufficiently Plead.**

22 Just as Plaintiffs’ claims for fraud are sufficiently and particularly plead, so is the cause of  
 23 action for negligent misrepresentation. Again, Defendant ignore the extensive facts alleged in  
 24 the Amended Complaint at Paragraphs 16-63. Plaintiffs go into extensive detail about what  
 25 representations were made (Paragraphs 28-30), that Plaintiffs relied on the representations  
 26 (Paragraph 31) and why Defendants knew, or should have known, that the information presented  
 27 was false (Paragraphs 86-88). Further, Defendants continue to misread the Amended Complaint  
 28 about who was present at the June 22, 2012 meeting. Thus, Plaintiffs have sufficiently and

1 particularly plead the necessary facts and allegations to support this cause of action and therefore,  
2 it is not subject to dismissal.

3 Further, pursuant to the discussion above regarding the inapplicability of the economic  
4 loss rule as it relates to the set of circumstances and allegations set forth in the Amended  
5 Complaint, the negligent misrepresentation cause of action is also not subject to dismissal under  
6 this theory. The facts alleged are separate and independent from those set forth in the breach of  
7 contract action and involve an inducement to have Plaintiffs enter into the separate Qualcomm  
8 contracts, which they did.

9 **E. Plaintiffs' Seventh Cause of Action for violations of California's Business and**  
10 **Professions Code § 17200 complies with pleading requirements.**

- 11 1. Because Plaintiffs' other Causes of Action are valid and sufficiently plead, the UCL  
12 claim is not subject to dismissal.

13 As Defendants noted, a UCL claim is "dependent on the substantive causes of action" in  
14 the complaint." *Ros v. U.S. Bank, N.A.* 2013 WL 3190684 (S.D. Cal 2013). As a result,  
15 because Plaintiffs other causes of action are not subject to dismissal, neither should the UCL  
16 claim.

- 17 2. Plaintiffs properly allege "unfair" conduct.

18 California's Business and Professions Code §17200 ("UCL") prohibits "unfair  
19 competition," which is broadly defined to include "three varieties of unfair competition — acts or  
20 practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Comms. Inc. v. L.A. Cellular*  
21 *Tel. Co.*, 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 541 (1999). Because the statute is  
22 written in the disjunctive, it is violated where a defendant's act or practice violates any of the  
23 foregoing prongs. *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012).

24 As a preliminary matter, Defendants allege that a UCL case must allege injury to  
25 competition itself and allege that because Plaintiffs and Defendants are not "competitors" the  
26 UCL claim should be dismissed (Defendants' motion, page 15, lines 22-24). Defendants' motion  
27 cites *Treefrog Developments Inc. v. Seido, Inc.* for this proposition.

1           However, the plaintiff and defendant in *Treefrog* were competitors and the analysis of that  
 2 case was based on the decision in *Cel-Tech, supra*. In analyzing the “unfair” prong, the  
 3 California Supreme Court in *Cel-Tech*, held that the word “unfair” means: “conduct that threatens  
 4 an incipient violation of an antitrust law, or violates the spirit or policy of those laws because its  
 5 effects are comparable to or the same as a violation of the law, or otherwise significantly  
 6 threatens or harms competition.” *Cel-Tech Comm., Inc.*, 20 Cal. 4th at 187. The test annunciated  
 7 in *Cel-Tech*, however, applies only to cases between direct competitors, not all “commercial”  
 8 cases. *Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1075 (C.D. Cal of  
 9 Cal. 2003). Since the decision in *Cel-Tech*, California courts have not settled on how to  
 10 determine “unfair” in the *non-competitor* context. 1

11           Here, it appears Defendants’ only challenge to the “unfair” prong is based on the  
 12 argument above, i.e. that because Defendants and Plaintiffs are not competitors, this prong is not  
 13 satisfied. However, as noted above, many courts have declined to apply this legal standard in  
 14 cases between non-competitors.

15           An “unfair” business practice occurs when it offends an established public policy or when  
 16 the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious.” *People v.*  
 17 *Casa Blanca Convalescent Homes, Inc.* 159 Cal. App. 3d 509, 530 (1984). In general, the  
 18 unfairness prong has been used to enjoin deceptive or sharp practices. *Klein v. Earth Elements,*  
 19 *Inc.* 59 Cal. App. 4th 965, 970 (1997).

20           Here, Plaintiffs have plead, with specificity, numerous immoral, unethical, oppressive and  
 21 unscrupulous actions on behalf of Defendants. In addition to the fraudulent conduct, discussed  
 22 below (which Plaintiffs also maintain would be considered “unfair” under this prong), Plaintiffs  
 23

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24  
 25 1 See *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718 (9<sup>th</sup> Cir. 2007) stating: “In the First District Court of Appeals, the court  
 26 extended the *Cel-Tech* definition to consumer cases. See *Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 128 Cal.Rptr.2d 389  
 27 (Cal. Ct. App. 2002). The Fourth District Court of Appeals initially proposed a test along the lines of *Cel-Tech* but later avoided  
 28 the question by dismissing the claim under both the old and the new standard. See *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 39 Cal.Rptr. 3d 634, 636 (Cal. Ct. App. 2006); *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 134 Cal.Rptr.2d 101 (Cal. Ct. App. 2003). The Second District Court of Appeals has issued two conflicting decisions, one applying the old balancing test, see *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 49 Cal.Rptr. 3d 227, 238 (Cal. Ct. App. 2006), and another, issued during the same week, holding that *Cel-Tech* overruled all prior definitions of unfairness and created a new test, see *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 48 Cal.Rptr. 3d 770, 776 (Cal. Ct. App. 2006). In *Camacho*, the court chose to apply the three-pronged test contained in the Federal Trade Commission Act, 15 U.S.C. § 45(a).”

also alleged in the Amended Complaint that Defendants continuously charged Plaintiffs with excessive and unwarranted fees, (including, in Plaintiff Gutierrez' case, for leased equipment that Defendant took possession of), (Paragraph 117 (l) and (n)). Furthermore, even more unethical and unscrupulous is that Defendants required Plaintiffs to pay third parties for time spent working on the Qualcomm account, even though those individuals did not even work for Plaintiffs at the time those services were provided (and prior to Plaintiffs even accepting the Qualcomm account (Paragraph 117 (m))). So, in essence, Defendants were improperly having personnel work at Qualcomm without being hired or under contract with any party and then forced Plaintiffs to pay these third parties. These actions certainly fulfill the "unfairness" prong of a UCL claim.

3. Plaintiff properly allege "fraudulent" conduct.

In a UCL claim, "fraudulent" does not refer to the common law tort of fraud but only requires a showing that members of the public "are likely to be deceived." *South Bay Chevrolet v. General Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301, 317 (1999) quoting *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994) and *Bank of the West v. Superior Court*, 2 Cal. 4th. 124, 126 (1992). This means that a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. *South Bay Chevrolet, supra* at 317.

Here, Plaintiffs allege sufficient fraudulent conduct to comply with this UCL prong as well. Plaintiffs' allegations in the Amended Complaint detail the requirements that Defendants were required to comply with when submitting its bid to the City of San Diego for the Qualcomm account (Paragraphs 23, 24 and 25). Plaintiffs allege that Defendants failed to comply with these requirements (Paragraphs 32, 33 and 34) and that by submitting its bid to the City of San Diego and then not fulfilling the requirements, Defendants not only deceived Plaintiffs, but the City of San Diego and the members of the public in general by representing that certain actions would be taken with respect to the cleaning of Qualcomm stadium during these large events (which affect *thousands* of people) (Paragraph 117 (i) through (k)).

Thus, because Plaintiffs have sufficiently alleged conduct which satisfies the "fraudulent" conduct of a UCL claim, this cause of action should not be dismissed.

1           **F.     Plaintiffs’ Amended Complaint sets forth sufficient facts to establish the**  
 2                       **Eighth Cause of Action for Intentional Infliction of Emotional Distress.**

3           Defendants first make the conclusory statement that damages for emotional distress are  
 4 not available in actions for breach of contract. However, this is laughable, since Defendants are  
 5 well aware that Plaintiffs’ Amended Complaint alleges additional facts and circumstances that are  
 6 not rooted in a breach of contract claim. Plaintiffs allege numerous facts which revolve around  
 7 Defendants’ unethical and fraudulent actions.

8           Further, once again it appears that Defendants have not even read the entire Amended  
 9 Complaint. Defendants claim that “the Complaint alleges no specific facts whatsoever about the  
 10 emotional distress...” Plaintiffs refer the Court (and Defendants) specifically to Paragraphs 44  
 11 and 45 (also specifically referenced in the Eighth Cause of Action) which detail the experiences  
 12 and circumstances under which Plaintiffs suffered. While Defendants may wish to characterize  
 13 this as an “ordinary commercial contract” case, it is far from it. Defendants’ actions resulted in  
 14 serious emotional and economic stress to Plaintiffs, due to the inability to pay their employees  
 15 and the resulting distrust they endured and complaints received from their employees caused by  
 16 Defendants’ actions.

17           Because Plaintiffs have set forth sufficient facts to establish the Eighth Cause of Action, it  
 18 should not be dismissed.

19           **G.     Plaintiffs Ninth Cause of Action for Declaratory Relief is particularly plead**  
 20                       **and requests relief not addressed in the other substantive causes of action.**

21           Once again, Defendants improperly contend that the Amended Complaint only alleges  
 22 conclusory, unsupported allegations. To the contrary, Plaintiffs’ Ninth Cause of Action for  
 23 Declaratory Relief clearly sets forth the basis and need for the Court’s determination regarding  
 24 the language in the Franchise Agreements (Paragraph 129). Specifically, it is alleged that the  
 25 punitive damage restriction is against public policy, as it is facially one-sided because the  
 26 damages limit is only applicable to the Franchisee. Therefore, Defendants’ allegation that  
 27 Plaintiffs failed to state “why” this provision should be disregarded has no merit.  
 28



1 A federal court may decline to address a claim for declaratory relief where the substantive  
2 claims would resolve the issues raised by the declaratory action. *Chanthavong v. Aurora Loan*  
3 *Servs.*, WL 6012353 at \*29 (E.D. Cal. 2011) quoting *Fimbres v. Chapel Mortg. Cop.*, No. 09-cv-  
4 0886-IED, 2009 U.S. Dist. LEXIS 109261, 2009 WL 416332, at \*5 (S.D. Cal. 2009).

5 Here, the relief sought in the Declaratory Relief action and the relief sought in the other  
6 causes of action are not duplicative. In fact, the relief sought in Declaratory Relief must logically  
7 be settled before relief could be established in other causes of action. Thus, it only makes sense  
8 for Plaintiffs to request a judicial determination, interpretation and declaration from the Court at  
9 this time, as to this issue. As a result, this cause of action should not be dismissed.

### 10 III. CONCLUSION

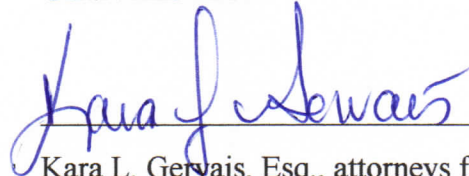
11 In light of the foregoing, Defendants have failed to establish that any of the causes of  
12 action stated in Plaintiffs' Amended Complaint should be dismissed under either Federal Rule of  
13 Civil Procedure Rule 12(b)(6) or Rule 9(B). As a result, Defendants Motion should be denied in  
14 its entirety.

15 In the alternative, in the event the Court finds that any cause of action was not properly  
16 plead or lacks specificity, Plaintiffs respectfully request that they be allowed to file an amended  
17 complaint.

18 Respectfully submitted.

19  
20 Dated: May 15, 2014

GERVAIS LAW

21  
22 

23 Kara L. Gervais, Esq., attorneys for Plaintiffs  
24 Tervon LLC, Sunyata and Eleanor Little and  
25 Mario Gutierrez



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document [PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 12(b)(6) and 9(B) MOTION TO DISMISS AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF] was forwarded via electronic mail on the 15<sup>th</sup> day of May, 2014 to:

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